

AMENDED IN SENATE MARCH 29, 2005

SENATE BILL

No. 646

Introduced by Senator Kuehl
(Coauthor: Assembly Member Oropeza)

February 22, 2005

An act to amend ~~Section 13269~~ *Sections 13269, 13301, and 13304* of the Water Code, relating to water.

LEGISLATIVE COUNSEL'S DIGEST

SB 646, as amended, Kuehl. Water discharge requirements: waivers.

Existing law, the Porter-Cologne Water Quality Control Act, authorizes the State Water Resources Control Board and a California regional water quality control board to waive certain waste discharge requirements as to a specific discharge or type of discharge if the state board or the regional board makes a specified determination. The act authorizes the state board or a regional board to include as a condition of the waiver the payment of an annual fee.

This bill would prohibit the state board or a regional board from granting a waiver for a discharge of a pollutant into a receiving water body that is identified as impaired by that pollutant pursuant to a provision of the federal Clean Water Act. The bill would require the state board or a regional board to include the payment of an annual fee as a condition of a waiver, and would require the annual fee to be adequate to pay for the cost of the waiver program.

This bill would make provisions applicable to cease and desist orders, punitive actions, or clean up and abatement orders in connection with violations of discharge requirements or of board orders or prohibitions also applicable to violations of discharge waiver conditions.

Vote: majority. Appropriation: no. Fiscal committee: yes.
State-mandated local program: no.

The people of the State of California do enact as follows:

1 SECTION 1. Section 13269 of the Water Code is amended to
2 read:

3 ~~13269. (a) (1) (A) On and after January 1, 2000, but subject~~
4 ~~to subparagraph (B), the provisions of subdivisions (a) and (c) of~~
5 ~~Section 13260, subdivision (a) of Section 13263, or subdivision~~
6 ~~(a) of Section 13264 may be waived by the state board or a~~
7 ~~regional board as to a specific discharge or type of discharge if~~
8 ~~the state board or a regional board determines, after any~~
9 ~~necessary state board or regional board meeting, that the waiver~~
10 ~~is consistent with any applicable state or regional water quality~~
11 ~~control plan and is in the public interest. The state board or a~~
12 ~~regional board shall give notice of any necessary meeting by~~
13 ~~publication pursuant to Section 11125 of the Government Code.~~

14 ~~(B) The provisions described in subparagraph (A) shall not be~~
15 ~~waived for a discharge into a water body that is identified as~~
16 ~~impaired pursuant to Section 303(d) of the Clean Water Act (33~~
17 ~~U.S.C. Sec. 1313(d)).~~

18 *13269. (a) (1) (A) Subject to subparagraphs (B) and (C), and*
19 *after any necessary state board or regional board meeting, the*
20 *provisions of subdivisions (a) and (c) of Section 13260,*
21 *subdivision (a) of Section 13263, or subdivision (a) of Section*
22 *13264 may be waived by the state board or a regional board as*
23 *to a specific discharge or type of discharge. The state board or a*
24 *regional board shall give notice of any necessary meeting by*
25 *publication pursuant to Section 11125 of the Government Code.*

26 *(B) The state board or a regional board shall make an*
27 *affirmative finding, based on substantial evidence in the record,*
28 *that the waiver is consistent with any applicable state or regional*
29 *water quality control plan and is in the public interest.*

30 *(C) The provisions described in subparagraph (A) shall not be*
31 *waived for a discharge of a pollutant into a receiving water body*
32 *that is identified as impaired by that pollutant pursuant to*
33 *Section 303(d) of the Clean Water Act (33 U.S.C. Sec. 1313(d)).*

34 *(2) A waiver may not exceed five years in duration, but may*
35 *be renewed by the state board or a regional board. The waiver*

shall be conditional and may be terminated at any time by the state board or a regional board. The conditions of the waiver shall include, but need not be limited to, the performance of individual, group, or watershed-based monitoring, except as provided in paragraph (3). Monitoring requirements shall be designed to support the development and implementation of the waiver program, including, but not limited to, verifying the adequacy and effectiveness of the waiver's conditions. In establishing monitoring requirements, the regional board may consider the volume, duration, frequency, and constituents of the discharge; the extent and type of existing monitoring activities, including, but not limited to, existing watershed-based, compliance, and effectiveness monitoring efforts; the size of the project area; and other relevant factors. Monitoring results shall be made available to the public.

(3) The state board or a regional board may waive the monitoring requirements described in this subdivision for discharges that it determines do not pose a significant threat to water quality.

(4) (A) The state board or a regional board shall include as a condition of a waiver the payment of an annual fee established by the state board in accordance with subdivision (f) of Section 13260. The annual fee shall be adequate to pay for the cost of the waiver program.

(B) Funds generated by the payment of the fee shall be deposited in the Waste Discharge Permit Fund for expenditure, upon appropriation by the Legislature, by the state board or appropriate regional board for the purpose of carrying out activities limited to those necessary to establish and implement the waiver program pursuant to this section. The total amount of annual fees collected pursuant to this section shall not exceed the costs of those activities necessary to establish and implement waivers of waste discharge requirements pursuant to this section.

(C) In establishing the amount of a fee that may be imposed on irrigated agriculture operations pursuant to this section, the state board shall consider relevant factors, including, but not limited to, all of the following:

- (i) The size of the operations.
- (ii) Any compliance costs borne by the operations pursuant to state and federal water quality regulations.

1 (iii) Any costs associated with water quality monitoring
2 performed or funded by the operations.

3 (iv) Participation in a watershed management program
4 approved by the applicable regional board.

5 (D) In establishing the amount of a fee that may be imposed
6 on silviculture operations pursuant to this section, the state board
7 shall consider relevant factors, including, but not limited to, all of
8 the following:

9 (i) The size of the operations.

10 (ii) Any compliance costs borne by the operations pursuant to
11 state and federal water quality regulations.

12 (iii) Any costs associated with water quality monitoring
13 performed or funded by the operations.

14 (iv) The average annual number of timber harvest plans
15 proposed by the operations.

16 (5) The state board or a regional board shall give notice of the
17 adoption of a waiver by publication within the affected county or
18 counties as set forth in Section 6061 of the Government Code.

19 (b) (1) A waiver in effect on January 1, 2000, shall remain
20 valid until January 1, 2003, unless the regional board terminates
21 that waiver prior to that date. All waivers that were valid on
22 January 1, 2000, and granted an extension until January 1, 2003,
23 and not otherwise terminated, may be renewed by a regional
24 board in five-year increments.

25 (2) Notwithstanding paragraph (1), a waiver for an onsite
26 sewage treatment system that is in effect on January 1, 2002,
27 shall remain valid until June 30, 2004, unless the regional board
28 terminates the waiver prior to that date. Any waiver for onsite
29 sewage treatment systems adopted or renewed after June 30,
30 2004, shall be consistent with the applicable regulations or
31 standards for onsite sewage treatment systems adopted or
32 retained in accordance with Section 13291.

33 (c) Upon notification of the appropriate regional board of the
34 discharge or proposed discharge, except as provided in
35 subdivision (d), the provisions of subdivisions (a) and (c) of
36 Section 13260, subdivision (a) of Section 13263, and subdivision
37 (a) of Section 13264 do not apply to a discharge resulting from
38 any of the following emergency activities:

39 (1) Immediate emergency work necessary to protect life or
40 property or immediate emergency repairs to public service

1 facilities necessary to maintain service as a result of a disaster in
2 a disaster-stricken area in which a state of emergency has been
3 proclaimed by the Governor pursuant to Chapter 7 (commencing
4 with Section 8550) of Division 1 of Title 2 of the Government
5 Code.

6 (2) Emergency projects undertaken, carried out, or approved
7 by a public agency to maintain, repair, or restore an existing
8 highway, as defined in Section 360 of the Vehicle Code, except
9 for a highway designated as an official state scenic highway
10 pursuant to Section 262 of the Streets and Highways Code,
11 within the existing right-of-way of the highway, damaged as a
12 result of fire, flood, storm, earthquake, land subsidence, gradual
13 earth movement, or landslide within one year of the damage.
14 This paragraph does not exempt from this section any project
15 undertaken, carried out, or approved by a public agency to
16 expand or widen a highway damaged by fire, flood, storm,
17 earthquake, land subsidence, gradual earth movement, or
18 landslide.

19 (d) Subdivision (c) is not a limitation of the authority of a
20 regional board under subdivision (a) to determine that any
21 provision of this division shall not be waived or to establish
22 conditions of a waiver. Subdivision (c) shall not apply to the
23 extent that it is inconsistent with any waiver or other order or
24 prohibition issued under this division.

25 (e) The regional boards and the state board shall require
26 compliance with the conditions pursuant to which waivers are
27 granted under this section.

28 (f) Prior to renewing any waiver for a specific type of
29 discharge established under this section, the state board or a
30 regional board shall review the terms of the waiver policy at a
31 public hearing. At the hearing, the state board or a regional board
32 shall determine whether the discharge for which the waiver
33 policy was established should be subject to general or individual
34 waste discharge requirements.

35 *SEC. 2 Section 13301 of the Water Code is amended to read:*

36 13301. When a regional board finds that a discharge of waste
37 is taking place, or threatening to take place, in violation of
38 requirements~~or~~, discharge prohibitions, *or waiver conditions*
39 prescribed by the regional board or the state board, the board
40 may issue an order to cease and desist and direct that those

1 persons not complying with the requirements or discharge
2 prohibitions (a) comply forthwith, (b) comply in accordance with
3 a time schedule set by the board, or (c) in the event of a
4 threatened violation, take appropriate remedial or preventive
5 action. In the event of an existing or threatened violation of waste
6 discharge requirements in the operation of a community sewer
7 system, cease and desist orders may restrict or prohibit the
8 volume, type, or concentration of waste that might be added to
9 that system by dischargers who did not discharge into the system
10 prior to the issuance of the cease and desist order. Cease and
11 desist orders may be issued directly by a board, after notice and
12 hearing.

13 *SEC. 3. Section 13304 of the Water Code is amended to read:*

14 13304. (a) Any person who has discharged or discharges
15 waste into the waters of this state in violation of any waste
16 discharge requirement~~or~~, other order or prohibition, *or waiver*
17 *condition* issued by a regional board or the state board, or who
18 has caused or permitted, causes or permits, or threatens to cause
19 or permit any waste to be discharged or deposited where it is, or
20 probably will be, discharged into the waters of the state and
21 creates, or threatens to create, a condition of pollution or
22 nuisance, shall upon order of the regional board, clean up the
23 waste or abate the effects of the waste, or, in the case of
24 threatened pollution or nuisance, take other necessary remedial
25 action, including, but not limited to, overseeing cleanup and
26 abatement efforts. A cleanup and abatement order issued by the
27 state board or a regional board may require the provision of, or
28 payment for, uninterrupted replacement water service, which
29 may include wellhead treatment, to each affected public water
30 supplier or private well owner. Upon failure of any person to
31 comply with the cleanup or abatement order, the Attorney
32 General, at the request of the board, shall petition the superior
33 court for that county for the issuance of an injunction requiring
34 the person to comply with the order. In the suit, the court shall
35 have jurisdiction to grant a prohibitory or mandatory injunction,
36 either preliminary or permanent, as the facts may warrant.

37 (b) (1) The regional board may expend available money to
38 perform any cleanup, abatement, or remedial work required
39 under the circumstances set forth in subdivision (a), including,
40 but not limited to, supervision of cleanup and abatement

1 activities that, in its judgment, is required by the magnitude of
2 the endeavor or the urgency for prompt action to prevent
3 substantial pollution, nuisance, or injury to any waters of the
4 state. The action may be taken in default of, or in addition to,
5 remedial work by the waste discharger or other persons, and
6 regardless of whether injunctive relief is being sought.

7 (2) The regional board may perform the work itself, or with
8 the cooperation of any other governmental agency, and may use
9 rented tools or equipment, either with operators furnished or
10 unoperated. Notwithstanding any other provisions of law, the
11 regional board may enter into oral contracts for the work, and the
12 contracts, whether written or oral, may include provisions for
13 equipment rental and in addition the furnishing of labor and
14 materials necessary to accomplish the work. The contracts are
15 not subject to approval by the Department of General Services.

16 (3) The regional board shall be permitted reasonable access to
17 the affected property as necessary to perform any cleanup,
18 abatement, or other remedial work. The access shall be obtained
19 with the consent of the owner or possessor of the property or, if
20 the consent is withheld, with a warrant duly issued pursuant to
21 the procedure described in Title 13 (commencing with Section
22 1822.50) of Part 3 of the Code of Civil Procedure. However, in
23 the event of an emergency affecting public health or safety, the
24 regional board may enter the property without consent or the
25 issuance of a warrant.

26 (4) The regional board may contract with a water agency to
27 perform, under the direction of the regional board, investigations
28 of existing or threatened groundwater pollution or nuisance. The
29 agency's cost of performing the contracted services shall be
30 reimbursed by the regional board from the first available funds
31 obtained from cost recovery actions for the specific site. The
32 authority of a regional board to contract with a water agency is
33 limited to a water agency that draws groundwater from the
34 affected aquifer, a metropolitan water district, or a local public
35 agency responsible for water supply or water quality in a
36 groundwater basin.

37 (c) (1) If the waste is cleaned up or the effects of the waste are
38 abated, or, in the case of threatened pollution or nuisance, other
39 necessary remedial action is taken by any governmental agency,
40 the person or persons who discharged the waste, discharges the

1 waste, or threatened to cause or permit the discharge of the waste
2 within the meaning of subdivision (a), are liable to that
3 governmental agency to the extent of the reasonable costs
4 actually incurred in cleaning up the waste, abating the effects of
5 the waste, supervising cleanup or abatement activities, or taking
6 other remedial action. The amount of the costs is recoverable in a
7 civil action by, and paid to, the governmental agency and the
8 state board to the extent of the latter's contribution to the cleanup
9 costs from the State Water Pollution Cleanup and Abatement
10 Account or other available funds.

11 (2) The amount of the costs constitutes a lien on the affected
12 property upon service of a copy of the notice of lien on the owner
13 and upon the recordation of a notice of lien, that identifies the
14 property on which the condition was abated, the amount of the
15 lien, and the owner of record of the property, in the office of the
16 county recorder of the county in which the property is located.
17 Upon recordation, the lien has the same force, effect, and priority
18 as a judgment lien, except that it attaches only to the property
19 posted and described in the notice of lien, and shall continue for
20 10 years from the time of the recording of the notice, unless
21 sooner released or otherwise discharged. Not later than 45 days
22 after receiving a notice of lien, the owner may petition the court
23 for an order releasing the property from the lien or reducing the
24 amount of the lien. In this court action, the governmental agency
25 that incurred the cleanup costs shall establish that the costs were
26 reasonable and necessary. The lien may be foreclosed by an
27 action brought by the state board on behalf of the regional board
28 for a money judgment. Money recovered by a judgment in favor
29 of the state board shall be deposited in the State Water Pollution
30 Cleanup and Abatement Account.

31 (d) If, despite reasonable effort by the regional board to
32 identify the person responsible for the discharge of waste or the
33 condition of pollution or nuisance, the person is not identified at
34 the time cleanup, abatement, or remedial work is required to be
35 performed, the regional board is not required to issue an order
36 under this section.

37 (e) "Threaten," for purposes of this section, means a condition
38 creating a substantial probability of harm, when the probability
39 and potential extent of harm make it reasonably necessary to take

1 immediate action to prevent, reduce, or mitigate damages to
2 persons, property, or natural resources.

3 (f) Replacement water provided pursuant to subdivision (a)
4 shall meet all applicable federal, state, and local drinking water
5 standards, and shall have comparable quality to that pumped by
6 the public water system or private well owner prior to the
7 discharge of waste.

8 (g) (1) Any public water supplier or private well owner
9 receiving replacement water by reason of an order issued
10 pursuant to subdivision (a), or any person or entity who is
11 ordered to provide replacement water pursuant to subdivision (a),
12 may request nonbinding mediation of all replacement water
13 claims.

14 (2) If so requested, the public water suppliers receiving the
15 replacement water and the persons or entities ordered to provide
16 the replacement water, within 30 days of the submittal of a water
17 replacement plan, shall engage in at least one confidential
18 settlement discussion before a mutually acceptable mediator.

19 (3) Any agreement between parties regarding replacement
20 water claims resulting from participation in the nonbinding
21 mediation process shall be consistent with the requirements of
22 any cleanup and abatement order.

23 (4) A regional board or the state board is not required to
24 participate in any nonbinding mediation requested pursuant to
25 paragraph (1).

26 (5) The party or parties requesting the mediation shall pay for
27 the costs of the mediation.

28 (h) As part of any cleanup and abatement order that requires
29 the provision of replacement water, a regional board or the state
30 board shall request a water replacement plan from the discharger
31 in cases where replacement water is to be provided for more than
32 30 days. The water replacement plan is subject to the approval of
33 the regional board or the state board prior to its implementation.

34 (i) A “water replacement plan” means a plan pursuant to
35 which the discharger will provide replacement water in
36 accordance with a cleanup and abatement order.

37 (j) This section does not impose any new liability for acts
38 occurring before January 1, 1981, if the acts were not in violation
39 of existing laws or regulations at the time they occurred.

1 (k) Nothing in this section limits the authority of any state
2 agency under any other law or regulation to enforce or administer
3 any cleanup or abatement activity.

4 (l) The Legislature declares that the amendments made to
5 subdivision (a) of this section by Senate Bill 1004 of the 2003–04
6 Regular Session do not constitute a change in, but are declaratory
7 of, existing law.

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9
10 CORRECTIONS: _____

11 Digest – Page 1.
12 _____